

From: [Lotthammer, Shannon \(MPCA\)](#)
To: [Holst, Linda](#); [Hyde, Tinka](#)
Cc: [Flood, Rebecca \(MPCA\)](#); [Kessler, Katrina \(MPCA\)](#)
Subject: FW: TSS/Eutrophication Rule Court Petition
Date: Tuesday, October 07, 2014 4:19:22 PM
Attachments: [DOC100314-10032014123552.pdf](#)

Here is a scanned copy of the documents filed with the Minnesota Court of Appeals.

Many thanks!!

Shannon

October 3, 2014

VIA MESSENGER SERVICE

Clerk of Appellate Court
Minnesota Court of Appeals
Minnesota Judicial Center
25 Rev. Dr. Martin Luther King Jr. Boulevard
St. Paul, MN 55155

Commissioner John Linc Stine
Minnesota Pollution Control Agency
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St. Paul, MN 55155-4194

Jean Coleman, Esq.
Minnesota Pollution Control Agency
520 Lafayette Road North
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Attorney General Lori Swanson
Office of the Attorney General
1400 Bremer Tower
445 Minnesota Street
St. Paul, MN 55101-2127

**Re: Minnesota Environmental Science and Economic Review Board *et al.* v. Minnesota
Pollution Control Agency,
Appellate Court Case No. _____
Office of Administrative Hearing Docket No. 60-2200-30791**

Dear Clerk of Appellate Court:


Pursuant to Minnesota Statutes, Section 14.44 and Rule 114 of the Minnesota Rules of Appellate Procedure, enclosed herewith for filing in the above-referenced matter, please find the following:

1. Petition for Declaratory Judgment;
2. Petitioners' Statement of the Case;
3. Filing fee of \$550.00; and
4. Affidavit of Service.

By copy of this letter, service is made upon Respondent Minnesota Pollution Control Agency and the Office of the Attorney General. Should you have any questions or require additional information, please contact me at (651) 225-8840. Thank you.

Very truly yours,

FLAHERTY & HOOD, P.A.


Steven W. Nyhus (#0296193),
Attorney for Petitioners

Enclosures

RECEIVED

OCT 03 2014

**MPCA COMMISSIONERS
OFFICE**

STATE OF MINNESOTA
IN COURT OF APPEALS

Minnesota Environmental Science and
Economic Review Board;
Coalition of Greater Minnesota Cities;
League of Minnesota Cities;
Minnesota Soybean Growers Association,

Petitioners,

vs.

Minnesota Pollution Control Agency,

Respondent.

PETITION FOR DECLARATORY
JUDGMENT

OFFICE OF ADMINISTRATIVE
HEARINGS DOCKET NUMBER:
60-2200-30791

REVISOR'S NUMBER: R-4104

COURT OF APPEALS CASE
NUMBER: _____

TO: THE COURT OF APPEALS OF THE STATE OF MINNESOTA, 305 MINNESOTA JUDICIAL CENTER, 25 REV. DR. MARTIN LUTHER KING JR. BLVD., ST. PAUL, MN 55155; THE MINNESOTA OFFICE OF THE ATTORNEY GENERAL, 1400 BREMER TOWER, 445 MINNESOTA STREET, ST. PAUL, MN 55101; AND THE MINNESOTA POLLUTION CONTROL AGENCY, 520 LAFAYETTE ROAD NORTH, ST. PAUL, MN 55155-4194:

The Minnesota Environmental Science and Economic Review Board (herein "MESERB"), the Coalition of Greater Minnesota Cities (herein "CGMC"), the League of Minnesota Cities (herein the "League"), and the Minnesota Soybean Growers Association (herein "MSGA"), pursuant to Minn. Stat. § 14.44 hereby petition the Minnesota Court of Appeals for a declaratory judgment that certain amendments to Minnesota Rules Parts 7050.0150 (Determination of Water Quality, Biological and Physical Conditions, and Compliance with Standards), 7050.0220 (Specific Water Quality Standards by Associated Use Classes), and 7050.0222 (Specific Water Quality Standards For Class 2 Waters of the State; Aquatic Life and Recreation), which amendments were adopted by Respondent Minnesota Pollution Control Agency (herein "MPCA") on August 4, 2014, are invalid on the grounds that the amendments violate constitutional provisions, exceed the MPCA's statutory rulemaking authority, and were adopted without compliance with statutory rule-making procedures.

DATED: October 3, 2014

STEVEN W. NYHUS, ESQ. (Atty. No. 0296193)
FLAHERTY & HOOD, P.A.
525 PARK STREET, SUITE 470
ST. PAUL, MN 55103
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SIGNATURE

Attorney for Petitioners

STATE OF MINNESOTA
IN COURT OF APPEALS

Minnesota Environmental Science and
Economic Review Board;
Coalition of Greater Minnesota Cities;
League of Minnesota Cities;
Minnesota Soybean Growers Association,

Petitioners,

STATEMENT OF THE CASE OF
PETITIONERS

OFFICE OF ADMINISTRATIVE
HEARINGS DOCKET NUMBER:
60-2200-30791

vs.

REVISOR'S NUMBER: R-4104

Minnesota Pollution Control Agency,

Respondent.

COURT OF APPEALS CASE
NUMBER: _____

1. Court or agency of case origination and name of presiding judge or hearing officer.

Minnesota Pollution Control Agency, Commissioner John Linc Stine
Office of Administrative Hearings, Administrative Law Judge James E. LaFave

2. Jurisdictional statement.

(C) Other Appellate Proceedings

Statute, rule or other authority authorizing appellate proceeding:

This Court has jurisdiction over this declaratory judgment action pursuant to Minn. Stat. §§ 14.44-14.45 and Minn. R. App. P. 114.01 *et seq.*

Authority fixing time limit for appellate review (cite statutory section and date of event triggering appeal time, e.g., mailing of decision, receipt of decision, or receipt of other notice):

Minn. Stat. § 14.44 provides as follows:

The validity of any rule may be determined upon the petition for a declaratory judgment thereon, addressed to the Court of Appeals, when it appears that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair the legal rights or privileges of the petitioner. The agency shall be made a party to the proceeding. The declaratory judgment may be rendered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question, and whether or not the agency has commenced an action against the petitioner to enforce the rule.

Respondent Minnesota Pollution Control Agency (herein "MPCA") took final action to adopt the disputed rules on June 24, 2014. Petitioner Minnesota Environmental Science and Economic Review Board (herein "MESERB") petitioned for reconsideration of the MPCA's decision pursuant to Minn. R. 7000.0750 and 7000.2100 on July 3, 2014. Respondent MPCA denied the motion on July 22, 2014. Respondent MPCA published notice of adoption of the disputed rules in the *Minnesota State Register* on August 4, 2014.

Because of the Court of Appeals' original jurisdiction over declaratory judgment actions, the time limits for appeals set forth in Minn. R. Civ. App. P. 104.01 do not apply to this action. *See e.g. Fryberger v. Township of Fredenberg*, 428 N.W.2d 601 (Minn. Ct. App. 1988) (observing that there exists no authority in Minnesota law supporting the proposition that declaratory judgment actions under Minn. Stat. § 14.44 are subject to any time limits).

3. State type of litigation and designate any statutes at issue.

This case is a petition for a declaration on the validity of certain amendments to Minn. R. 7050.0150, 7050.0220, and 7050.0222, attached hereto as Petitioners Exhibit 1 and incorporated herein by reference. The following statutes and regulations are at issue in this action:

Minn. R. 7050.0150, subps. 4(C), (E), (T); 5(D), (E), (G), and 5b
Minn. R. 7050.0220, subps. 3a(A)(12), 4a(A)(12), and 5a(A)(8)
Minn. R. 7050.0222, subps. 2, 2b, 3, 3b, 4, and 4b
Minn. Stat. § 14.001 *et seq.*
Minn. Stat. § 115.03
Minn. Stat. § 116.02
Minn. Stat. § 116.07

4. Brief description of claims, defenses, issues litigated and result below.

Petitioner Minnesota Environmental Science and Economic Review Board (herein "MESERB") is a municipal joint powers entity under Minn. Stat. § 471.59, comprised of thirty-nine cities, public utilities commissions and sanitary sewer districts throughout Greater Minnesota. MESERB works to ensure that regulations affecting wastewater treatment are reasonable and based on sound science.

Petitioner Coalition of Greater Minnesota Cities (herein "CGMC") is a nonprofit advocacy organization comprised of eighty Greater Minnesota municipalities that are collectively dedicated to a strong Greater Minnesota. CGMC member cities serve the wastewater treatment needs of their communities, and the CGMC supports an environmental protection program that is based on sound science, rather than administrative ease, and works to ensure that water quality rules are balanced and backed by state funding so that Minnesota will be able to clean its impaired waters and prevent new impairments in the future, while using scarce resources wisely.

Petitioner League of Minnesota Cities (herein "League") has a voluntary membership of 830 out of 854 Minnesota cities. The League represents the common interests of Minnesota cities before judicial courts and other governmental bodies. The League represents each of its member cities in this matter.

Petitioner Minnesota Soybean Growers Association (herein "MSGA") is an association that monitors government policies in Minnesota and at the federal level, supports research activities, and supports market development activities to improve the profitability of soybean farmers throughout Minnesota.

The memberships of Petitioners MESERB, CGMC, and the League include municipalities that hold National Pollutant Discharge Elimination System / State Disposal System (NPDES/SDS) permits issued by the MPCA. These permits are renewed by the MPCA approximately every five years. Water quality standards adopted by the MPCA are applied to these permits, and where applicable are translated into pollutant effluent limits for the affected permittees.

Petitioner MSGA has members that have NPDES permits for Concentrated Animal Feeding Operations (CAFOs). Further, animal agriculture is the largest customer for soybeans. The disputed rules will impact farming operations in terms of nonpoint source loading: improper calculations of natural background loading and inaccurate associations of nonpoint source nutrient loading will be reflected in Total Maximum Daily Loads (TMDLs) calculated on the disputed rules. The disputed rules and TMDLs developed upon them will likely result in valuable farmland being taken out of production.

This Petition arises from the MPCA's adoption of amendments to Minn. R. 7050.0150, 7050.0220, and 7050.0222 on August 4, 2014 (*see* Petitioners Exhibit 1). Specifically, these amendments establish numeric eutrophication water quality standards for rivers and streams in Minnesota. Nutrients are regulated to prevent excessive plant growth from adversely impacting aquatic life and public recreation uses in Minnesota waters.

The disputed rules provide numeric thresholds for phosphorus as well as several "response variables" purported to indicate excess algae growth: chlorophyll-a (a measure of plant growth), biochemical oxygen demand (BOD), and dissolved oxygen variation (DO flux). Standards were also developed for concentrations of periphyton (attached algae) chlorophyll-a. Exceedance of the phosphorus threshold plus at least one of the response variables means that nutrients are causing "impairment" of a river or stream segment and therefore, such nutrient levels must be reduced. MPCA's express objective of the disputed rules is to reduce or prevent eutrophication (problem algae growth) in Minnesota rivers and streams.

Petitioners provided extensive technical commentary both prior to and during the public comment period, which began on November 18, 2013 and concluded with the issuance of the Administrative Law Judge's (ALJ's) report on May 2, 2014. Petitioners also provided written comments and oral testimony at the MPCA Citizens Board hearings on June 24 and July 22, 2014. Throughout this process, the Petitioners asserted, among other points, the following:

1. the *Standard Methods for the Examination of Water and Wastewater's* testing protocol for BOD is not and never has been considered a valid indicator of nutrient impairment, as it measures effects of numerous non-nutrient parameters and the published protocol specifically states it is not to be used as a direct indicator of water quality impairment;
2. the MPCA had not conducted the essential technical analyses (confounding factors analysis) required to ensure that the use of the chosen BOD, DO flux and periphyton chlorophyll-a response variables are scientifically defensible and will reasonably identify flowing waters as "impaired" by excess nutrients;
3. the rules are to be applied to river and stream segments that MPCA itself concluded are (1) hydrologically distinct; and (2) do not comport with the datasets or stream responses used to develop the disputed rules, specifically in the Red River of the North and small streams dominated by periphyton;
4. the MPCA's stated intent to use the disputed rules only to identify those river and stream segments (1) actually impaired by excess algae, (2) where elevated BOD is primarily caused by excessive floating algae and (3) where DO flux is caused by floating algae, not periphyton, is contrary to the adopted rules that are not so

delimited, and EPA commentary in the public record indicating that such discretion is not permissible;

5. the rulemaking record contains no evidence that either the selected DO flux or BOD test results actually are set at a threshold level that causes aquatic life or other use impairment, contrary to applicable rules and policies for the establishment of water quality criteria;
6. the rulemaking record failed to demonstrate that it is reasonable to apply the proposed standards to smaller-order rivers or streams that respond very differently to nutrient concentrations, and that such decision was expressly at odds with the MPCA's earlier lake nutrient standards that regulate small lakes differently from large lakes due to their different characteristics that control how nutrients affect water quality; and
7. the rulemaking record contains no credible evidence supporting the assertion that the use of BOD and DO flux as response variables is accepted in the scientific community as appropriate for standards to prevent nutrient impairment.

MPCA responded on several occasions that the specific issues raised by Petitioners regarding the disputed rules had received ample peer review, that support for the adoption of the disputed rules was widespread, and that the ALJ agreed with the MPCA's conclusions. Petitioners reviewed the purported peer review documents cited in the administrative record, and observed that *none* of the purported peer reviews addressed the specific issues raised by Petitioners and that neither MPCA nor EPA ever expressly asked any peer reviewer to address the specific issues raised, despite the fact that these issues had been raised repeatedly over a four-year period.

As a result of these procedural errors, the disputed rules will result in river and stream segments being identified as "impaired" where the alleged impairments are not, in fact, related to excess nutrients, or where impairments in fact do not exist. NPDES permits (including stormwater discharges) will be improperly forced to contain far more restrictive nutrient limitations due to the manner in which the rules were established. Application of the rules will result in the calculation of water quality-based effluent limits (WQBELs) for phosphorus, which will be dramatically lower than what is currently required from affected point sources and will result in expensive, misdirected wastewater treatment plant modifications. Petitioners, as owners/operators of publicly owned treatment works, bear the risk of funding and implementing such effluent limits or conducting studies to amend the arbitrarily established rules.

5. List specific issues proposed to be raised on appeal.

- I. Did the MPCA adopt amendments to Minn. R. 7050.0150, .0220, and .0222 without compliance with statutory rulemaking procedures, by failing to respond directly to relevant issues repeatedly raised by commentators during the public comment period?
- II. Did the MPCA adopt amendments to Minn. R. 7050.0150, .0220, and .0222 without compliance with statutory rulemaking procedures, by failing to conduct and make available in the rulemaking record analyses to ensure that proposed numeric nutrient standards for rivers and streams would not be overbroad and that the selected response variables are actually responding to nutrients and not some other influences?
- III. Did the MPCA adopt amendments to Minn. R. 7050.0150, .0220, and .0222 without compliance with statutory rulemaking procedures, by failing to amend their rules to reflect the intended application, instead claiming the existence of discretion in applying the disputed rules when evidence in the record indicates that such discretion does not in fact exist?
- IV. Did the MPCA exceed its statutory authority under Minn. Stat. § 115.03 *et seq.*, by adopting numeric nutrient standards for rivers and streams that:
 - A. regulate large rivers and small streams identically despite acknowledging the two systems respond very differently to nutrients;
 - B. fail to include the analyses necessary to select proper nutrient response variables;
 - C. fail to include scientifically defensible information confirming that DO flux and/or the level of DO flux and BOD selected as the impairment criteria threshold reflect actual adverse impacts on aquatic life and public recreational uses from these parameters;
 - D. establish nutrient criteria violations even where excessive algal growth is not occurring;
 - E. adopt the BOD test as a nutrient impairment indicator when the test expressly indicates it should not be used in this fashion;
 - F. apply DO flux criteria to waters dominated by periphyton (the presence of which MPCA documented greatly affects DO flux) despite MPCA's acknowledged that excessive periphyton growth was not indicative of a nutrient induced impairment; and
 - G. fail to determine the natural level of DO flux in state waters and setting DO flux impairment levels at or below the range found in natural settings?

6. Related appeals.

There are no prior or pending appeals arising from the same action as this appeal, and there are no known pending appeals in separate actions raising similar issues to this appeal.

7. Contents of record.

Is a transcript necessary to review the issues on appeal? Yes (X) No ()

If yes, full (X) or partial () transcript?

Has the transcript already been delivered to the parties and filed with the trial court administrator? Yes () No (X)

If not, has it been ordered from the court reporter? Yes () No (X)

If a transcript is unavailable, is a statement of the proceedings under Rule 110.03 necessary? Yes () No (X)

In lieu of the record as defined in Rule 110.01, have the parties agreed to prepare a statement of the record pursuant to Rule 110.04? Yes () No (X)

8. Is oral argument requested? Yes (X) No ()

If so, is argument requested at a location other than that provided in Rule 134.09, subd. 2? Yes () No (X)

9. Identify the type of brief to be filed.

Formal brief under Rule 128.02. (X)

10. Names, addresses, zip codes and telephone numbers of attorney for appellant and respondent.

Attorney for Petitioners:

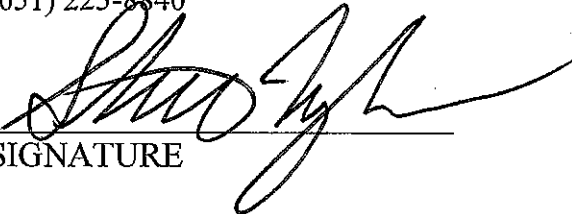
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Attorney for Respondent Minnesota Pollution Control Agency:

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DATED: October 3, 2014

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SIGNATURE

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